

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re J.S. et al., Persons Coming Under the  
Juvenile Court Law.

SAN MATEO COUNTY HUMAN  
SERVICES AGENCY,

Plaintiff and Respondent,

v.

K.S.,

Defendant and Appellant;

R.S.,

Defendant and Respondent.

A155356

(Solano County Super. Ct. Nos.  
17JD0830, 17JD0831, 17DJ0832)

In re J.S. et al., Persons Coming Under the  
Juvenile Court Law.

SAN MATEO COUNTY HUMAN  
SERVICES AGENCY,

Plaintiff and Respondent,

v.

K.S.,

Defendant and Appellant;

R.S.,

Defendant and Respondent;

A155635

(Solano County Super. Ct. Nos.  
17JD0830, 17JD0831, 17DJ0832)

J.S., et al.,

Objectors and Appellants.

In No. A155356, the first of these two consolidated dependency appeals, K.S. (Mother) appeals from the juvenile court's order summarily denying her petition to change an order regarding visitation for her three children (Minors) and their father, R.S. (Father). In No. 155635, Mother and two of the three Minors appeal the juvenile court's subsequent order terminating dependency jurisdiction. We reverse the order terminating jurisdiction, remand for the juvenile court to hold a contested evidentiary hearing on termination, and dismiss the first appeal.

#### BACKGROUND<sup>1</sup>

##### *Original Petitions and Initial Reports*

In September 2017, the San Mateo Human Services Agency (Agency) filed Welfare and Institutions Code section 300 petitions on behalf of Minors, then six, five, and three years old.<sup>2</sup> The petitions alleged sexual abuse and emotional harm by Father as to all three Minors, and physical harm by Father as to the oldest two Minors. The juvenile court issued a temporary restraining order prohibiting Father from contacting Minors other than in supervised visitation at the Agency's discretion. Minors remained in Mother's care.

The jurisdiction hearing was continued multiple times. Agency reports filed during this period provide as follows. Mother reported seeing concerning sexualized behaviors in August and September of 2017, including the younger two Minors trying to put their mouths on each other's penises, putting their fingers in each other's anuses and reporting that Father taught them how to do that, and putting their tongues in each other's

---

<sup>1</sup> An exhaustive recitation of every fact and allegation from the dependency proceeding is not necessary to our resolution of these appeals, and is not set forth below.

<sup>2</sup> All undesignated section references are to the Welfare and Institutions Code.

mouths; the oldest Minor pulling his brother's head towards his crotch and stating " 'I'm daddy S[.]' "; and finding the youngest Minor asleep in the parents' bed during the night with his hand on Father's erect penis, with Father either asleep or pretending to be asleep. Mother also reported Father physically disciplined the oldest Minor by pinching, twisting, or grabbing his neck, and had kicked the middle Minor's feet out from underneath him. The maternal grandmother reported witnessing the same or similar incidents. Mother filed for divorce in October 2017, shortly after the petitions were filed. Custody proceedings in the divorce case apparently were on hold pending the jurisdictional hearing in the dependency case.

In interviews with the Agency, Father denied any sexual abuse and denied punishing Minors with violence, although he admitted once grabbing the oldest Minor's neck to break up a fight with another Minor. Father said Mother was "manic" and had a " 'pattern of . . . imagining things.' " In the months after the original petitions were filed, Father repeatedly emailed the Agency photographs of Minors showing scratch marks and other potential injuries he claimed were sustained while in Mother's care, but the Agency concluded none of the alleged injuries met the criteria for child abuse or neglect.

Minors were interviewed once by the Keller Center and repeatedly by an Agency social worker, but the only disclosure regarding the allegations was the oldest Minor's report that " '[o]ne time [Father] hurt my neck.' " Minors began crisis counseling in September 2017. The oldest and youngest Minors were diagnosed with post-traumatic stress disorder. The middle Minor was reported to be "externaliz[ing] his emotional distress through aggression with caregivers and siblings." In February 2018, the oldest Minor wrapped a seatbelt around his own neck and said " 'Bye bye, [oldest Minor].' " In the same month, during a supervised visit with Father, the middle Minor made a comment about going outside " 'to go kill himself.' "

Mother continued to report periodic sexualized behavior. For example, the oldest Minor tried to " 'dry hump' " Mother's leg, tried to put his mouth and hand on Mother's genitalia, and was " 'moaning and groaning' and saying 'Oh, that feels so good.' " There were also multiple reports, from Mother and service providers, of Minors' frequent

physical aggression toward each other and caregivers. For example, an in-home counseling service report stated, based on observations of Minors within Mother's home, that Minors behave aggressively "an average of ten times within an hour" and "engage in unsafe physical interactions with each other on a routine basis."

Psychological evaluations of Mother, Father, and Minors were conducted. Mother's psychologist reported her test results "evidenced an over-permissive parenting style" of a type that "can foster behavioral acting out by children," but which "should not be deemed the sole, or even primary, cause of the boys['] aggressive acting out. There appears to be entrenched and severe co-parenting problems that likely contributed to the boys' misconduct." The psychologist evaluating Father reported personality testing suggested "a personality type that is over-controlled," which may result in "a buildup in anger and frustration" leading to "impulse control problems and even explosive outbursts." However, the psychologist did not find risk factors predictive of child sexual abuse. The psychologist evaluating Minors noted Minors had not made disclosures of sexual abuse to anyone other than Mother, but opined that "the emotional tone of [the] children's denials and body language during the Keller Center interview, and when interviewed by me, suggested there was something they were hiding." She found it "not likely" that either Minors or Mother fabricated the allegations, and instead found it "more likely than not that the children's sexual acting out behavior results from their being sexually abused."

#### *Stipulated Jurisdiction and Disposition*

In April 2018, the parties stipulated to jurisdiction and disposition.<sup>3</sup> Specifically, the parties stipulated to section 300, subdivision (c), jurisdiction on the ground that all three Minors are "suffering serious emotional damage, or [are] at risk of suffering serious

---

<sup>3</sup> At a February 2018 hearing, the juvenile court indicated it was considering dismissing the petitions because "even if the charges were proven to be true, assuming arguendo, I didn't find, in the materials hitherto available to this Court, that there is a failure to protect." The Agency, Mother, and two of the Minors opposed dismissal; Father supported dismissal; and the third Minor took no position.

emotional damage due to the conduct of the parents.<sup>[4]</sup> All three children are exhibiting abnormal & hyper-aggressive behavior, including biting, kicking, punching and scratching each other and other individuals. [Two Minors] have been clinically diagnosed with PTSD, with unknown trauma triggers. It has been reported that all three children have been exhibiting some age-inappropriate sexualized behavior. Court oversight is needed to assist in determining the children's safety at this time.” The Agency filed amended petitions consistent with this stipulation, omitting the physical and sexual abuse allegations of the original petitions.

With respect to disposition, the parties stipulated to a case plan for both parents of individual therapy, maintaining a safe environment for Minors, and ensuring Minors' participation in behavioral plans. They also stipulated to a three-phase plan for Father's visitation. In the first phase, Father's supervised visits “will increase in duration immediately, and visits may be at off-site locations . . . .” The Agency will communicate with Father's therapist to ensure “the goals of therapy address the issues of this case, as described in the sustained petitions. Once this is completed, the visitation moves to phase 2, so long as the Nanny or private visitation supervisor discussed in phase 2 has attended at least one supervised visit.” In the second phase, Father will have monitored visits at which the Agency will have a monitor and Father will have either a nanny or private visitation supervisor. The third phase, unsupervised visits, “will occur in consultations with Minors' attorneys . . . ; based on the clinical parenting assessment; [Father's] making progress towards treatment goals; and the readiness of the children to have additional time with [Father].”

---

<sup>4</sup> Section 300, subdivision (c), authorizes dependency jurisdiction when a child “is suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, as a result of the conduct of the parent or guardian or who has no parent or guardian capable of providing appropriate care.”

At a May 1, 2018 hearing, the juvenile court sustained the amended petitions, declared Minors dependents, and adopted the stipulated case plan and visitation schedule. A six-month family maintenance review hearing was set for October.

*Six-Month Family Maintenance Review Report*

In the Agency's report submitted in advance of the six-month review hearing, the Agency reported on the visitation changes. On May 12, 2018, Father began facilitated/monitored visits for eight hours per week. Mother believed that Minors spent time in Father's attic watching pornography on a computer and that Minors were afraid to enter the attic. The private visitation monitor told the Agency Minors willingly went into the attic and Father did not have a computer there. Mother reported an increase in Minors' sexualized behavior at home. On June 16, facilitated/monitored visitation was increased to 16 hours per week. During this time, the oldest Minor told Mother that Father punched and pinched him, but when interviewed by Agency staff, he stated Father did not hit him. Mother sent the Agency several photographs of injuries Minors reportedly sustained at Father's home.

On July 11, the Agency informed the parties that unsupervised visits would commence. The Agency received a referral that the youngest Minor reported Father choked him, but deemed it inconclusive. In early August, Mother filed a section 388 petition to return Father's visits to supervised because the oldest and youngest Minors reported physical violence by Father, and because Minors' aggressive and sexualized behaviors had increased. Mother submitted declarations from herself, Mother's maternal aunt, and Minors' former nanny. The juvenile court denied the section 388 petition without an evidentiary hearing.

On August 14, the youngest two Minors began overnight visits with Father. The Agency received a new allegation of past sexual abuse of the oldest Minor, which was evaluated out. The exchanges were sometimes fraught and in late August, the Agency arranged for a neutral party to transport Minors after visits. On September 4, the oldest Minor had his first overnight visit with Father. Although the oldest Minor was upset when he learned he would be staying overnight, Father reported the visit went well. On

September 13, Father's visits increased to every Thursday afternoon after school until Sunday morning at 10 a.m.

The Agency provided reports from Minors' therapists. Therapists for each Minor reported an increase in aggressive behaviors since the visitation changes. In October, the middle Minor's therapist informed the Agency that he recently "grabbed her breast four times" during a therapy session. The oldest Minor's therapist expressed concern that if the dependency case terminated, the oldest Minor's "therapeutic progress will be negatively impacted." The youngest Minor's therapist opined that juvenile court oversight was necessary to keep Minors safe.

The Agency characterized the parents' positions as follows: Mother "believes the father should be supervised around the children. She also believes the family needs the support of the mental health providers to continue to help herself and the children heal from the reported abuse that previously occurred in the family home. It is not clear whether mother has moved past the initial sexual abuse allegations that she agreed would not be sustained as part of the April 19, 2018 Settlement Agreement. Since she entered the Settlement Agreement, mother has not been supportive of its terms and has attempted to limit her children's visitation with their father on more than one occasion." Father "believes that the children are not safe in the mother's home. He also believes that the mother should be supervised around the children. He is very concerned with alleged parental alienation going on in the mother's home and the impact this will have on their children's emotional well-being. The father regularly refers to his belief that the mother is mentally ill, he freely exhibits his anger and hostility at the social worker and other providers, and he firmly believes his children are being emotionally abused by the mother."

The Agency's evaluation of the case noted Mother "has remained focused on participation with the children's mental health providers" and, albeit "[a]fter repeated prodding," herself began individual therapy. Father "began individual therapy immediately, and has also participated in Wraparound services to support the children's emotional well-being." The family "has been offered the highest level of services

available from the Agency to address the emotional turmoil the children had experienced in the family home as a result of the parents' dysfunctional relationship. Unfortunately, the Agency had to address multiple new allegations since the petition was sustained in May 2018. Even though none of the allegations were substantiated, the children were still subjected to questioning by the parents, maternal relatives, multiple social workers, and the police. . . . The father's inability to emotionally regulate in front of the children will not support the children's stability and could hinder any progress made in treatment. The [Agency social worker] remains concerned for the children's emotional well-being during this high conflict divorce. Nonetheless, both parents and all three children have participated in all of the services the Agency has to offer and each individual has made their own progress."

The evaluation continued: "[T]he children continue to have episodic aggressive behavior toward one another and with the parents. The [Agency social worker] believes the aggressive behavior is a direct result of the children's exposure to the parent's toxic relationship, ongoing battle for custody, and adjustment to transitions with visitation. . . . While the parents may have a long way to go in finalizing their divorce, learning to co-parent, and each moving on, the Agency believes the children are safe in each of their respective parent's homes and there is nothing more the Agency can offer this family at this time. The [Agency social worker] does not believe the Agency's involvement with this family is helping the children or the family as a whole, but rather, it appears that each parent is trying to manipulate the Agency and the providers to support their respective custody goals." The Agency recommended the juvenile court terminate the dependency case and refer final custody orders to the family court.

#### *Review Hearing and Termination Order*

The six-month family maintenance review hearing was held on October 23, 2018. The juvenile court asked whether any of Minors' counsel objected to the Agency's recommendation, and counsel for the oldest and youngest Minors voiced their



objections.<sup>5</sup> The court next asked if they wished to present evidence, and both responded that they did but they were not prepared to proceed at that time. The juvenile court asked for an offer of proof. Counsel for the youngest Minor said she would call his therapist and service providers from the Wraparound Program, but did not describe the substance of the testimony other than to say it would be information not already contained in the Agency's report. Counsel for the oldest Minor said she would call two of his therapists, and described the testimony of one as "the regression and the concern she has as to my client's welfare with the rapid changes in unsupervised and overnight visits and how that has been detrimental to my client . . . ."

After asking the Agency whether it had the authority to terminate the case without an evidentiary hearing, the juvenile court ruled as follows: "Here is what I am going to do -- and I am not going to listen to any more argument. [¶] I will make a finding in this particular case, unlike any other I have seen that should have stayed in family law and crept its way in here, that this continues to be more damaging to the children than helpful. [¶] It is not in their best interests for this matter to proceed. [¶] The case is dismissed, and there are no custodial orders emanating from the dependency court, which has been most cynically abused by the parents in this matter."

After this ruling, Mother's counsel asked to make a record and objected to the court's ruling without an evidentiary hearing. Counsel continued, "I would like to put on evidence. I have about 30 witnesses that I identified --" at which point the juvenile court ruled, "That is denied." Counsel for the oldest and youngest Minors also recorded their objections to the juvenile court terminating jurisdiction without hearing their evidence.

---

<sup>5</sup> Counsel for the middle Minor did not state a position on termination.

## DISCUSSION

### I. *Termination of Dependency Jurisdiction (No. A155635)*

The oldest Minor, the youngest Minor, and Mother (collectively, appellants) appeal from the juvenile court's order terminating dependency jurisdiction.<sup>6</sup> Appellants contend the juvenile court erred in terminating jurisdiction without allowing appellants to present evidence on the issue. In the alternative, appellants argue that, as a matter of law, conditions still existed justifying the initial assumption of jurisdiction. We agree with the first contention and do not reach the second.

In dependency proceedings, “[a]fter the child is declared a dependent, the juvenile court must review the status of the child every six months. [Citations.] Section 364 provides the standard when the child under the supervision of the juvenile court is not removed from the physical custody of the parent or guardian.” (*In re Armando L.* (2016) 1 Cal.App.5th 606, 614.) Section 364 provides, in relevant part: “After hearing any evidence presented by the social worker, the parent, the guardian, or the child, the court shall determine whether continued supervision is necessary. The court shall terminate its jurisdiction unless the social worker or his or her department establishes by a preponderance of evidence that the conditions still exist which would justify initial assumption of jurisdiction under Section 300, or that those conditions are likely to exist if supervision is withdrawn.” (§ 364, subd. (c).) Thus, “[s]ection 364, subdivision (c) establishes a statutory presumption in favor of terminating jurisdiction and returning the child to the parents’ care without further court supervision.” (*In re Armando L.*, at p. 615.)

“Although the statute refers to the social worker and the department establishing the basis for continuing jurisdiction, the first sentence of subdivision (c) of section 364 expressly makes clear the parent, guardian, or child may offer evidence on this question.

---

<sup>6</sup> The two appealing Minors filed separate briefs and joined each other's briefs, and Mother joined both Minors' briefs. The third Minor did not take a position below and did not file or join a brief in this appeal. We previously granted Father's request to be deemed a respondent and he joined in the Agency's brief.

The juvenile court is not bound by the department's or agency's recommendation to terminate jurisdiction if there is a preponderance of evidence to justify the court retaining it and the parent, guardian, child, or social agency has met that burden.” (*In re Armando L.*, *supra*, 1 Cal.App.5th at p. 615.) “The juvenile court makes this determination based on the totality of the evidence before it . . . .” (*Ibid.*) “In short, under section 364[, subdivision (c)], the juvenile court must terminate dependency jurisdiction unless either the parent, the guardian, the child, or the social services agency establishes by a preponderance of the evidence that the conditions justifying assumption of jurisdiction exist or will exist if supervision is withdrawn.” (*In re Aurora P.* (2015) 241 Cal.App.4th 1142, 1155–1156.)

In *In re Armando L.*, the child welfare agency recommended termination at the section 364 family maintenance review hearing. (*In re Armando L.*, *supra*, 1 Cal.App.5th at p. 613.) The mother objected and indicated her desire for a contested evidentiary hearing. (*Ibid.*) The juvenile court terminated jurisdiction without hearing her evidence. (*Ibid.*) The Court of Appeal held the mother “had a right to present evidence at the section 364 hearing to challenge dismissal of the dependency action and to present any evidence relevant to the court’s exit orders. The juvenile court’s denial of an evidentiary hearing on these issues deprived mother of her due process right to present evidence . . . .” (*Id.* at p. 614.)

We agree with appellants that they, like the mother in *Armando L.*, had the right to a contested hearing on the issue of termination. Respondents argue *Armando L.* is distinguishable because the juvenile court requested offers of proof and “impliedly found [them] insufficient to necessitate further evidentiary hearing . . . .” However, the juvenile court did not ask Mother for an offer of proof; indeed, it terminated jurisdiction without hearing any argument from Mother’s counsel (although counsel made a record after the court’s ruling). Thus, assuming section 364, subdivision (c), and due process permit the denial of an evidentiary hearing on termination upon the juvenile court’s finding that the objector’s offer of proof is insufficient (an issue we need not decide), the juvenile court did not permit Mother to make such an offer before it terminated jurisdiction.

Respondents next contend any error in failing to hold an evidentiary hearing was harmless because the proposed testimony would not outweigh the social worker's report, any behavioral regression was "likely" caused by Minors' uncertainty around the custodial arrangements and conflict between Mother and Father rather than Father's visitation, the Agency already provided reasonable services, and the parents can obtain services after dependency. In *Armando L.*, the Court of Appeal rejected the agency's contention that the error was harmless: "We cannot discern what evidence mother could have presented at the hearing that may have contradicted or elaborated on evidence in the social workers' reports. . . . [¶] We therefore decline the agency's invitation to review the record for harmless error where there is a void in the evidence created by the juvenile court's failure to have a contested hearing. . . . We are left to guess as to what evidence mother may have presented, an impossible task without a record based on an evidentiary hearing. We are a court of review, not a tribunal of speculation." (*In re Armando L.*, *supra*, 1 Cal.App.5th at pp. 620–621.) Although the objecting Minors identified service providers as their proposed witnesses, Mother did not have the opportunity to identify her proposed witnesses before the juvenile court ruled. Thus, as in *Armando L.*, we cannot find the error harmless.

Accordingly, we will reverse the termination order and remand for the juvenile court to hold a contested hearing on termination. We emphasize, however, that the juvenile court may place reasonable limits on the presentation of evidence. For example, it need not hear testimony that is already represented in the Agency's report, or testimony that is irrelevant to the issue before it. "Juvenile courts . . . have both the power and the need to control their proceedings and make clear that 'time is not an unlimited commodity in today's busy juvenile courts' [citation]." (Seiser & Kumli, *California Juvenile Courts Practice and Procedure* (2019 ed.) § 2.110[19]; see also *In re Jordan R.* (2012) 205 Cal.App.4th 111, 133 ["The due process right to present evidence is limited to relevant evidence of significant probative value to the issues before the court."].)

## II. *Mother's Section 388 Petition (No. A155356)*

As noted above, Mother filed a section 388 petition in August 2018 asking the juvenile court to change the stipulated disposition order regarding visitation and require Father's visits be supervised. Minors all agreed with Mother's request; the Agency and Father disagreed. The juvenile court denied the petition without holding an evidentiary hearing. Mother appeals, contending the summary denial was in error.<sup>7</sup>

We are already remanding the dependency case to the juvenile court for an evidentiary hearing on termination of jurisdiction. If the juvenile court terminates jurisdiction following the evidentiary hearing, Mother's appeal of the section 388 denial will likely be moot. (See *In re Michelle M.* (1992) 8 Cal.App.4th 326, 330 [termination of dependency jurisdiction rendered appeal from jurisdictional and dispositional orders moot].) If the juvenile court retains jurisdiction, it may well issue a new visitation order based on current circumstances, thereby superseding the visitation order challenged by Mother's section 388 petition and rendering Mother's appeal moot. (See *In re I.A.* (2011) 201 Cal.App.4th 1484, 1490 ["When the court cannot grant *effective* relief to the parties to an appeal, the appeal must be dismissed."].) Accordingly, we conclude Mother's challenge to the juvenile court's section 388 order is not a justiciable "present, concrete, and genuine dispute as to which the court can grant effective relief." (*In re I.A.*, at p. 1489.) We will dismiss this appeal.

### DISPOSITION

In No. A155635, the juvenile court's order terminating dependency jurisdiction is reversed and remanded. In No. A155356, the appeal is dismissed.

---

<sup>7</sup> We previously denied Mother's petition for writ review of the order (No. A155581).

---

SIMONS, J.

We concur.

---

JONES, P.J.

---

BURNS, J.

(A155356, A155635)